2006

Rebekah Munson v. Bruce H. Chamberlain and Central Utah Medical Clinic : Brief of Appellant

Utah Court of Appeals

Curtis J. Drake, Troy L. Booher; Snell & Wilmer; Attorneys for Appelleees.
Ryan D. Tenney, Kenneth Parkinson; Howard, Lewis & Peterson P.C.; Attorneys for Appellant.

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

REBEKAH MUNSON, Appellant vs. BRUCE H. CHAMBERLAIN and CENTRAL UTAH MEDICAL CLINIC, Appellees	Case No. 20060447–CA

ADDENDUM TO APPELLANT'S OPENING BRIEF

APPEAL FROM THE RULINGS OF THE FOURTH DISTRICT COURT, UTAH COUNTY, HONORABLE LYNN W. DAVIS & HONORABLE DEREK P. PULLAN

RYAN D. TENNEY, and
KENNETH PARKINSON for:
HOWARD, LEWIS & PETERSEN, P.C.
120 E. 300 N.
P.O. Box 1248
Provo, Utah 84603
Telephone: 801-373-6345
Facsimile: 801-377-4991
ATTORNEYS FOR APPELLANT

CURTIS J. DRAKE, for:
SNELL & WILMER
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: 801-257-1900
Facsimile: 801-257-1800
ATTORNEYS FOR APPELLEES

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

REBEKAH MUNSON, Appellant vs. BRUCE H. CHAMBERLAIN and CENTRAL UTAH MEDICAL CLINIC, Appellees	Case No. 20060447–CA

ADDENDUM TO APPELLANT'S OPENING BRIEF

APPEAL FROM THE RULINGS OF THE FOURTH DISTRICT COURT, UTAH COUNTY, HONORABLE LYNN W. DAVIS & HONORABLE DEREK P. PULLAN

RYAN D. TENNEY, and
KENNETH PARKINSON for:
HOWARD, LEWIS & PETERSEN, P.C.
120 E. 300 N.
P.O. Box 1248
Provo, Utah 84603
Telephone: 801-373-6345
Facsimile: 801-377-4991
ATTORNEYS FOR APPELLANT

CURTIS J. DRAKE, for:
SNELL & WILMER
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: 801-257-1900
Facsimile: 801-257-1800
ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

Attachment A

may only be modified in the event of the death of the judgment creditor.

(5) If the court finds that the judgment debtor, or the assignee of his obligation to make periodic payments, has failed to make periodic payments as ordered by the court, it *shall, in addition to the required periodic payments, order the* judgment debtor or his assignee to pay the judgment creditor all damages caused by the failure to make payments, including court costs and attorney's fees.

(6) The obligation to make periodic payments for all future damages, other than damages for loss of future earnings, shall cease upon the death of the judgment creditor. Damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In that case the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this section.

(7) If security is posted in accordance with Subsection (3), and approved by a final judgment entered under this section, the judgment is considered to be satisfied, and the judgment debtor on whose behalf the security is posted shall be discharged. 1992

78-14-10. Actions under Utah Governmental Immunity Act.

The provisions of this act shall apply to malpractice actions against health care providers which are brought under the Utah Governmental Immunity Act insofar as they are applicable; provided, however, that this act shall in no way affect the requirements for filing notices of claims, times for commencing actions and limitations on amounts recoverable under the Utah Governmental Immunity Act. 1976

78-14-11. Act not retroactive — Exception.

The provisions of this act, with the exception of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this act. 1976

78-14-12. Division to provide panel — Exemption — Procedures — Statute of limitations tolled — Composition of panel — Expenses — Division authorized to set license fees.

(1) (a) The division shall provide a hearing panel in alleged medical liability cases against health care providers as defined in Section 78-14-3, except dentists.

(b) (i) The division shall establish procedures for prelitigation consideration of medical liability claims for damages arising out of the provision of or alleged failure to provide health care.

(ii) The division may establish rules necessary to administer the process and procedures related to prelitigation hearings and the conduct of prelitigation hearings in accordance with Sections 78-14-12 through 78-14-16.

(c) The proceedings are informal, nonbinding, and are not subject to Title 63, Chapter 46b, Administrative Procedures Act, but are compulsory as a condition precedent to commencing litigation.

(d) Proceedings conducted under authority of this section are confidential, privileged, and immune from civil process.

(2) (a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the service of a statutory notice of intent to commence action under Section 78-14-8.

(b) The request shall include a copy of the notice of intent to commence action. The request shall be mailed to all health care providers named in the notice and request.

(3) (a) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limita*tions until the earlier of 60 days following the division's* issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

(b) (i) The division shall complete a prelitigation hearing under this section within 180 days after the filing of the request for prelitigation panel review, or within any longer period as agreed upon in writing by all parties to the review.

(ii) If the prelitigation hearing has not been completed within the time limits established in Subsection (3)(b)(i), the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation.

(c) (i) The claimant and any respondent may agree by written stipulation that no useful purpose would be served by convening a prelitigation panel under this section.

(ii) When the stipulation is filed with the division, the division shall within ten days after receipt enter an order divesting itself of jurisdiction over the claim, as it concerns the stipulating respondent, and stating that the claimant has complied with all conditions precedent to the commencement of litigation regarding the claim.

(4) The division shall provide for and appoint an appropriate panel or panels to hear complaints of medical liability and damages, made by or on behalf of any patient who is an alleged victim of medical liability. The panels are composed of:

(a) one member who is a resident lawyer currently licensed and in good standing to practice law in this state and who shall serve as chairman of the panel, who is appointed by the division from among qualified individuals who have registered with the division indicating a willingness to serve as panel members, and a willingness to comply with the rules of professional conduct governing lawyers in the state of Utah, and who has completed division training regarding conduct of panel hearings;

(b) (i) one member who is a licensed health care provider listed under Section 78-14-3, who is practicing and knowledgeable in the same specialty as the proposed defendant, and who is appointed by the division in accordance with Subsection (5); or

(ii) in claims against only hospitals or their employees, one member who is an individual currently serving in a hospital administration position directly related to hospital operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim, and who is appointed by the division; and

(c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state, selected and appointed by the division from among individuals who have completed division training with respect to panel hearings.

(5) (a) Each person listed as a health care provider in Section 78-14-3 and practicing under a license issued by the state, is obligated as a condition of holding the license to participate as a member of a medical liability prelitigation panel at reasonable times, places, and in

vals, upon issuance, with advance notice given in a reasonable time frame, by the division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

(b) A licensee may be excused from appearance and participation as a panel member upon the division finding participation by the licensee will create an unreasonable burden or hardship upon the licensee.

(c) A licensee whom the division finds failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed $5,000.

(d) A licensee whom the division finds intentionally or repeatedly failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed $5,000, and is guilty of unprofessional conduct.

(e) All fines collected under Subsections (5)(c) and (d) shall be deposited in the Physicians Education Fund created in Section 58-67a-1.

(6) Each person selected as a panel member shall certify, under oath, that he has no bias or conflict of interest with respect to any matter under consideration.

(7) Members of the prelitigation hearing panels shall receive per diem compensation and travel expenses for attending panel hearings as established by rules of the division.

(8) (a) In addition to the actual cost of administering the licensure of health care providers, the division may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.

(b) The claimant bears none of the costs of administering the prelitigation panel except under Section 78-14-16. 2002

78-14-13. Proceedings — Authority of panel — Rights of parties to proceedings.

(1) No record of the proceedings is required and all evidence, documents, and exhibits are returned to the parties or witnesses who provided the evidence, documents, and exhibits at the end of the proceedings upon the request of the parties or witnesses who provided the evidence.

(2) The division may issue subpoenas for medical records directly related to the claim of medical liability in accordance with division rule and in compliance with the following:

(a) the subpoena shall be prepared by the requesting party in proper form for issuance by the division; and

(b) the subpoena shall be accompanied by:

(i) an affidavit prepared by the person requesting the subpoena attesting to the fact the medical record subject to subpoena is believed to be directly related to the medical liability claim to which the subpoena is related; or

(ii) by a written release for the medical records to be provided to the person requesting the subpoena, signed by the individual who is the subject of the medical record or by that individual's guardian or conservator.

(3) Per diem reimbursement to panel members and expenses incurred by the panel in the conduct of prelitigation panel hearings shall be paid by the division. Expenses related to subpoenas are paid by the requesting party, including witness fees and mileage.

(4) The proceedings are informal and formal rules of evidence are not applicable. There is no discovery or perpetuation of testimony in the proceedings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

(5) (a) A party is entitled to attend, personally or with counsel, and participate in the proceedings, except upon special order of the panel and unanimous agreement of the parties. The proceedings are confidential and closed to the public.

(b) No party has the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed. The panel may, however, request special or supplemental participation of some or all parties in particular respects.

(c) Communications between the panel and the parties, except the testimony of the parties on the merits of the dispute, are disclosed to all other parties.

(6) The division shall appoint a panel to consider the claim and set the matter for panel review as soon as practicable after receipt of a request.

(7) Parties may be represented by counsel in proceedings before a panel. 1994

78-14-14. Decision and recommendations of panel — No judicial or other review.

The panel shall render its opinion in writing not later than 30 days after the end of the proceedings. The panel shall determine on the basis of the evidence whether each claim against each health care provider has merit or has no merit and, if meritorious, whether the conduct complained of resulted in harm to the claimant.

There is no judicial or other review or appeal of the panel's decision or recommendations. 1985

78-14-15. Evidence of proceedings not admissible in subsequent action — Panelist may not be compelled to testify — Immunity of panelist from civil liability — Information regarding professional conduct.

(1) Evidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction.

(2) No panelist may be compelled to testify in a civil action subsequently filed with regard to the subject matter of the panel's review A panelist has immunity from civil liability arising from participation as a panelist and for all communications, findings, opinions, and conclusions made in the course and scope of duties prescribed by this section.

(3) Nothing in this chapter may be interpreted to prohibit the division from considering any information contained in a statutory notice of intent to commence action, request for prelitigation panel review, or written findings of a panel with respect to the division's determining whether a licensee engaged in unprofessional or unlawful conduct. 1994

78-14-16. Proceedings considered a binding arbitration hearing upon written agreement of parties — Compensation to members of panel.

Upon written agreement by all parties, the proceeding may be considered a binding arbitration hearing and proceed under Title 78, Chapter 31a, except for the selection of the panel, which is done as set forth in Subsection 78-14-12(4). If the proceeding is considered an arbitration proceeding, the parties are equally responsible for compensation to the members of the panel for services rendered. 1985

78-14-17. Arbitration agreements.

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

(a) the patient shall be given, in writing, the following information on:

Attachment B

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

REBEKAH MUNSON,

Plaintiff,

vs.

CENTRAL UTAH MEDICAL CLINIC,

Defendant.

ORIGINAL

Case No. 050100024
010404581

Bench Trial
Electronically Recorded on
February 25, 2004

BEFORE: THE HONORABLE LYNN W. DAVIS
Fourth District Court Judge

APPEARANCES

For the Plaintiff:

Kenneth Parkinson
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84603
Telephone: (801)373-6345

For the Defendant:

Curtis J. Drake
Tawni J. Sherman
SNELL & WILMER
15 West South Temple
Suite 1200
Salt Lake City, Utah 84101
Telephone: (801)257-1900

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-0027

EXHIBIT

-oOo-

PROCEEDINGS

(Electronically recorded on April 25, 2004)

THE COURT: Case No. 010404581, Rebekah Munson vs. Bruce Chamberlain, M.D. and Central Utah Medical Clinic. The record will reflect that Kenneth Parkinson, attorney at law is here in behalf of Rebekah Munson, who is present. Then for defendants we have Curtis Drake, and then we have Tawni Sherman, and the gentleman in the middle?

MR. DRAKE: Your Honor, Bruce Chamberlain --

THE COURT: Okay, Bruce Chamberlain.

MR. DRAKE: -- seated to my immediate right.

THE COURT: Very well.

MR. DRAKE: And a representative of the Central Utah Medical Center, Martin Kerchoff in the dark suit.

MR. KERCHOFF: Good morning.

THE COURT: Okay, very well. Let's see, at least preliminarily, Counsel, we have since the last time we were in Court we have a motion to compel the production of allegedly altered medical records. Tell me the status of that motion and whether there's been an exchange of those documents.

MR. PARKINSON: Your Honor, with respect to that I wrote Mr. Drake and informed him that we do not claim nor have any memory of claiming that he alt -- that Dr. Chamberlain altered the records; and if there is such a claim, we're unaware of it and we waive that.

THE COURT: Okay.

MR. DRAKE: And in light of that, we would withdraw the motion.

THE COURT: Okay, I will show -- the record may show that that motion has been withdrawn. Now, subsequent to the last time we were together, there's also a motion to reconsider filed on February the 19th of 2004. What do we wish to do in connection with that? You may be seated and relax, Counsel.

MR. DRAKE: Thank you, your Honor. May I address that?

THE COURT: Yes, sir.

MR. DRAKE: We have had conversation with Mr. Parkinson as late as yesterday afternoon; and I understand that he will be withdrawing the claim for the alleged connection between gall bladder disease --

THE COURT: Yes.

MR. DRAKE: -- or the choledochectomy, which was the essence of the motion, as the Court will recall.

THE COURT: Correct.

MR. DRAKE: In light of that representation and the confirmation that we have received about the withdrawal of that claim; and that there will be no evidence or any argument in this case, that the connection is there between gall bladder and choledochectomy, we would withdraw the motion to reconsider as well.

MR. PARKINSON: That's correct.

THE COURT: Okay, very well, and I will show the motion to reconsider being withdrawn, based upon the representations made in open Court today. Any other preliminary matters now?

MR. PARKINSON: I think there may be, your Honor. I received a fax from Mr. Drake yesterday telling me that he was going to move to exclude my expert; and that seems to me to be a preliminary matter that we ought to discuss at this point prior to making opening statements.

THE COURT: Okay.

MR. PARKINSON: There may be other matters as well. There's some other border skirmishes that may be appropriate to deal with at this time.

THE COURT: Okay. Mr. Drake?

MR. DRAKE: Your Honor, yes, if I may. We would be prepared to either proceed by way of proffer at this point. I think there is a need for an evidentiary foundation that goes to the essence of the argument, but in summary it is this.

I learned quite recently in the course of preparing for the cross examination of Mr. Parkinson's expert, Dr. Jacobs that as part of the materials that were provided to Dr. Jacobs way back in late 2001, the materials included two documents among others. These two being of particular concern.

The first is a notice of intent, which as the Court knows is the document that begins the commencement of an action against a healthcare provider in Utah. It is the statutory

requirement under the Act; and indeed that was filed in March of 2001. That document was provided to Dr. Jacobs in a letter from Mr. Parkinson of December 31st, 2001. There were medical records and other things that went with that letter initially to Dr. Jacobs as well.

Another item that went with that letter is a letter from Dr. Greg Cane, dated April 2nd of 2001. Now, by way of background, Dr. Cane is himself an internist and was an expert witness whom Mr. Parkinson had retained to submit an opinion to the pre-litigation hearing panel, which was held in August of 2001.

So again, with this letter to Dr. Jacobs went two documents; the notice of intent and a letter from Dr. Greg Cane. Both those documents were presented to the pre-litigation hearing panel in August of 2001. The Healthcare Malpractice Act makes it clear that the pre-litigation hearing proceedings are confidential. They're privileged; and evidence that is presented to the panel must remain confidential.

It is our position that the 1999 case of Doe vs. Maret -- I have copies to provide to the Court if it wishes -- specifically addressed the issue of the propriety of disclosing the notice of intent and other documents that have been provided to the pre-litigation hearing panel.

The Court held that disclosing a notice of intent, a confidential document that was submitted to the pre-litigation

hearing panel was subject to sanctions. It was a violation of the confidentiality provision.

So having learned recently that those two documents -- confidential documents were provided to Dr. Jacobs, presumably inadvertently, I don't know, the Doe case has been around since 1999. It is common knowledge among the medical malpractice community, if you will, that those documents simply can't be provided. So it is not a matter of us alleging any intentional impropriety at all. It is, I'm sure as Mr. Parkinson will address, inadvertence.

THE COURT: An oversight of some sort.

MR. DRAKE: Absolutely, but the Court will see in the Doe decision -- and if I may, I'm happy to retrieve that. Would that be helpful at this point?

THE COURT: Okay. I want to know the result as it relates to that, other than the suit -- the issue of subject to sanctions. How does it affect this lawsuit?

MR. DRAKE: It is sanctionable conduct, and the only sanction that has any meaning or force in this case is the disqualification of Dr. Jacobs, for this reason. He has received those documents. He has reviewed those documents. The notice of intent is confidential.

More concern to me, your Honor, is the so-called Dr. Cane letter, which -- and again, I cannot address the content, because I don't want to run afoul of the same

confidentiality issue, but it is a letter which provides information about Dr. Cane's review of the case, that was passed onto Dr. Jacobs. Then Dr. Jacobs renders his opinions in the case.

I have no way of cross examining Dr. Jacobs on the content of the Cane letter. It is privileged. There are omissions, there are inaccuracies, and it speaks to a relationship between those two witnesses that I think demonstrates bias and is certainly a fertile field for cross examination for me that I am precluded from approaching because of confidentiality.

So the Cane letter is very problematic. It basically takes a piece of the evidence that I would be able to utilize in cross examining Dr. Jacobs, and takes it out of the case. I can't approach it, because it is confidential by case law and by statute.

The only sanction that makes sense is to disqualify Dr. Jacobs, and that will be the nature of the motion. I'm prepared to make it at this time, and make a proffer of the fundamental documents in redacted form, that support the conclusion that the only remedy is to keep this gentleman from testifying, because he has received confidential information. That, in essence, your Honor, is our argument.

THE COURT: Okay. Mr. Parkinson.

MR. PARKINSON: Dr. Cane is a -- is a person hired to

do an initial evaluation of a case, to tell us whether we have a case; and Dr. Cane, in fact -- and it's clear in Dr. Jacobs' testimony in his deposition that Dr. Cane then found Dr. Jacobs for us. He's a middleman, so to speak. Provides an initial evaluation, and then found Dr. Jacobs.

THE COURT: He's not a broker.

MR. PARKINSON: In a sense he is, your Honor. Sure, sure. He's an M.D.; and he has no intent of testifying at trial on these cases. He provides an -- does an initial review, gives you an idea about the viability of your case, and then finds a doctor who can -- who is willing and able to testify. That's his position.

In this case Dr. Cane's letter and the notice of intent were sent to Alexander Jacobs, who is the expert that we've hired to testify in this case. They cite to and refer to the Maret case. With respect to the documents that we're talking about, I accept the proffers of Counsel. Let's have this discussion now, and I think it's better than having it partway through the trial. We can address it separately.

With respect to the Maret case, that is a medical malpractice case against a doctor -- in particularly a psychiatric doctor who disclosed psychiatric records to a -- to the other side in a divorce case, without the appropriate safeguards and requirements to make sure that those were disclosed properly.

THE COURT: Sure, or waiver on the party.

MR. PARKINSON: No waiver on the part of the parties; and so Doe was suing Maret for disclosing these records and wrecking her divorce. She didn't get the children, based in part on this. There is in the last paragraph of that a discussion about the notice of intent.

It just -- the way that paragraph starts off is it says, "We now turn to an unrelated issue." Maret in a brief before this Court made reference to Doe's notice of intent; and they've attached it as an exhibit to the Court. That's how the notice of intent came before the Court.

What we have in that case is we have one party disclosing a notice of intent -- is the only document -- drafted and created by another party. That's what the Court found objectionable in this case. It is not someone -- it is not a case of someone producing their own work product, which is what was done in this case.

We provided -- we didn't provide Dr. Jacobs with anything that anyone else produced, other than Dr. Cane, who was hired by us. We produced our work product. They have that information. It's my position that Dr. Cane's statement is open for cross examination. That it is not protected information. It is work product that was prepared on our behalf and provided to Dr. Jacobs.

You can reduce this argument to absurdity rather

quickly. The question becomes, does anything that is produced in a pre-litigation panel, does that mean that you can't use it at trial? Well, probably the most protected and private information that is produced in a pre-litigation panel are the medical records of the parties. That would be absurd to suggest that those medical records then cannot be used. Many attorneys --

THE COURT: Do you acknowledge that the documents were sent? There's --

MR. PARKINSON: Sure.

THE COURT: You've had no dispute as it relates to that -- both as it relates to the pre-litigation letter and the notice of intent.

MR. PARKINSON: Sure.

THE COURT: Is that correct?

MR. PARKINSON: Sure.

THE COURT: Okay.

MR. PARKINSON: They were sent --

THE COURT: What's --

MR. PARKINSON: -- with -- both of those documents were sent --

THE COURT: What's the remedy?

MR. PARKINSON: Well, first, there's no harm. That's the question; was there harm? There is no harm in this case. They can cross examine him about that. If we have a privilege,

we waive it. They can cross examine him about it. They can talk to him about it.

Second, it's our position that that is not, quote, unquote, "protected information." Again, in the Maret case we are talking about one person producing the other side's notice of intent, you know. Oppositional parties producing the other side's notice of intent.

Second we have the question of this came to my attention yesterday at 3 o'clock, was when I received Mr. -- I think 3 o'clock. I may be off on that. That's I believe when I received Mr. Drake's fax. We have some case law that there are -- in the case law there's a number of cases that say with our -- with our rules of evidence and rules of sharing documents, you know, we're not going to have a trial by ambush. That's what we have here, getting this the day before.

They would like to suggest that this was just discovered recently. This was discussed and talked about. Dr. Jacobs was -- his deposition was in November of 2002.

THE COURT: Well, was it raised in the context of a deposition? Was there any --

MR. PARKINSON: They asked him all the items that he reviewed in preparation for making his opinion. They -- we provided him -- that's where they received our letter to Dr. Jacobs.

THE COURT: "Your letter" meaning Dr. Cane's letter?

MR. PARKINSON: Our letter that said -- that had bullet points or numbered lists of all the documents that we were providing him to review in making his opinion.

THE COURT: Included within the bullet points is what?

MR. PARKINSON: Included within those, stated notice of intent. That's what they're relying on here. Those are the documents they're -- says, "Notice of Intent." It says, "Dr. Cane's letter." That's what they're talking about here.

Make no mistake about what they're doing here. This is a dispositive motion. If they were successful, our case would need to be dismissed because it's a medical malpractice case. We couldn't have someone testify about the standard of care; and we couldn't have someone testify about causation.

This isn't a sponge left in the stomach type of case. It's a case in which we need an expert to testify about the standard of care and causation. It's a dispositive motion that is raised the day before trial. The afternoon of the day before trial.

Now, normally dispositive motions, the rules provide that they're raised 30 days before trial for good reason. For some reason this one's raised the day before trial.

THE COURT: Well, raised the morning of trial before the Court.

MR. PARKINSON: Correct. So to summarize our position, the Maret case is a different proposition. It's one person

disclosing another person's items that were provided, not someone providing their own work product.

Second, the Maret case does not purport to limit all documents that are produced at these -- does not attempt to stop all documents that are produced at these hearings. It was a very broad case. It was dicta in the case, and there's no way that you could suggest that the medical records cannot then be used in trial, because that's the sort of thing that are used -- that's used.

Really, there's -- with respect to the notice of intent, which is the only item that is discussed in Maret. They just talk about the notice of intent. With respect to the notice of intent, that's what I prepared. I suppose I could have taken "Notice of Intent" off the top of it, and send a letter that said, "This is our claim in the case," and maybe they would still make the objection. I don't know. I don't know how I can be prevented from sharing the things that I prepared with my expert.

Then finally, this is a dispositive motion raised the day before trial; and it's inappropriate.

THE COURT: Okay. If there's a waiver on the record of any privilege whatsoever, how does that affect you?

MR. DRAKE: If it were a privilege with which we are dealing, it would be entirely appropriate, but we aren't dealing with a privilege. We are dealing with the confidential

status of these documents that has been established in black letter law by the statute, and by black letter case law in the Maret decision, your Honor.

It is a status that cannot be waived. It is a protection that is afforded these documents by not only the Legislature, but the Utah Supreme Court. While I appreciate the generosity of the offer of waiver it does not solve my dilemma, and I do not dare discuss the substance of those documents, particularly the Cane letter, in this case, without subjecting myself to sanctions.

So it is not a privilege that can be waived. It is a confidential status that neither party has the power to address nore change; and that is my dilemma. May I approach and provide the (inaudible).

THE COURT: Sure. Tell me about the timeliness as it relates to this, Counsel. If you could reasonably have been aware of this as of the date of the deposition of Dr. Jacobs in November of 2002?

MR. DRAKE: Yes, your Honor. It's an appropriate question; and the answer is this. The deposition of Dr. Jacobs was thorough. It began as most do, with the discussion of the materials that he reviewed. No mention was made of the notice of intent, nor was any mention made of the Cane letter.

There is discussion of Dr. Cane being the one who arranged for Dr. Jacobs; and indeed, in response to the Court's

observation is he a broker, the redacted letter from Dr. Cane, which I will proffer, is headed with Medical -- "Med-Mal Experts, Inc. We broker integrity."

Again, something that speaks to the relationship that I can't touch. So there was no discussion in the deposition about the notice of intent. There was no discussion about the Cane letter. The deposition concluded without any hint of that.

These documents are first described in the letter from Mr. Parkinson of December 31 that I referenced, that was produced with all the other documents at the Cane deposition, that I began to review in preparation for this trial; and it was at that time, a few days ago, that I discovered the problem.

I scrambled to provide and did provide to Mr. Parkinson redacted copies of all the relevant documents which I will proffer, if the Court will allow, to alert him that this is a grave concern. I got the exhibits out, because we had agreed to exchange stuff last Friday. He has been provided with the redacted copies for several days.

We spoke about it last night. I apologize, I sent him a letter to alert him, because it was only a recent discovery. It was in preparation for trial that I discovered it in the form of a letter. Your Honor, it is not a balancing proposition, I would submit. It is not a matter of intent on

Mr. Parkinson's part. Nor is it something to compare, I would submit, timeliness, when I have provided these materials as soon as I could.

As the Court well knows, the last 30 days has been filled with numerous motions, motions to reconsider, all kinds of things that diverted attention away from the discovery of this issue until recently.

May I quote from the Maret decision to illustrate --

THE COURT: Sure.

MR. DRAKE: -- (inaudible). It is at page -- the last page of the decision, the concluding paragraph, paragraph 14, your Honor.

THE COURT: Page 6?

MR. DRAKE: Because of the way these things are printed out, I never know which page is which. So it is the last paragraph at what my copy says "paragraph 14," and it begins with, "We turn now to an unrelated issue." The copy that I gave the Court has page 9 of 9 in the upper right-hand --

THE COURT: And is it highlighted?

MR. DRAKE: -- and page 8 --

THE COURT: Yeah, "We turn now to an unrelated issue."

MR. DRAKE: Exactly, your Honor; and continuing the quotation, Maret -- in his brief before this Court made reference and quoted to "That was notice of intent to commit malpractice action. In addition, as Mr. Parkinson has

explained, the sequence of how that came before the Court."

The key language is this, your Honor. Whether the notice of intent is part of the pre-litigation, quote, "proceeding," end quote, has never been determined by this Court. "Today we hold --" this is not dicta -- "that because the notice of intent serves as the basis for the pre-litigation panel review, and because it is often utilized as part of the pre-litigation review, it is part of the proceeding and must be kept confidential.

"Although we decline to impose sanctions for Maret's disclosure, particularly in view of the heretofore unsettled status of the notice, failure to keep pre-litigation proceedings confidential may in the future result in sanctions."

The tone of the admonition could not be more clear. As I've indicated, it is not a matter of waiving a privilege. It is a confidential status that cannot be waived, cannot be ignored; and I would approach with peril if I attempted to utilize in this case, and I simply can't.

So I have been denied an opportunity to at the very outset examine Dr. Jacobs about the nature of his involvement in this case, what he learned from Dr. Cane, how he made mistakes, all kinds of things is off the table.

Your Honor, at this time I'm happy to continue with a proffer, which I believe I will need to do to establish a

foundation. I'm happy to do that at this time, or whatever the Court would allow.

THE COURT: You may proceed with your proffer.

MR. DRAKE: Thank you. It's going to take -- I have five exhibits to be marked.

THE COURT: Okay.

(Counsel speaks with the clerk off the record)

MR. DRAKE: Your Honor, if I may have a moment to provide Mr. Parkinson with copies before I begin the proffer; and there are six. I misspoke.

THE COURT: While you do that, do you have any problem if I retire to chambers and read this entire --

MR. DRAKE: I would say none whatsoever, your Honor.

MR. PARKINSON: Your Honor, may also ask and request the Court that you read the statute that we're talking about?

THE COURT: I will.

MR. PARKINSON: The statute does say that the pro -- that the proceedings conducted under authority of this section are confidential, privileged and immune from processing. It does use the word "privileged," contrary to Mr. Drake's assertions in his argument.

MR. DRAKE: Your Honor, may I approach? I have a bench copy of the statute.

THE COURT: Sure.

(Recess taken)

(Recording is turned on mid-sentence)

THE COURT: -- to read the Maret case and provisions in the Utah code that relate to that. We are back on the record on Rebekah Munson vs. Bruce Chamberlain, M.D. and Central Utah Medical Clinic. It's case No. 010404581. Let me just make one statement initially as it relates to the case. It is not dicta.

It might be a collateral issue that came up in the case, but it is a holding. When the Supreme Court says, "Whether the notice of intent is part of the pre-litigation proceeding has never been determined by this Court." Then I emphasize the language, "Today we hold," period. It's not dicta. "Today we hold that because the notice of intent serves as the basis for the pre-litigation panel review, and because it is often utilized as part of the pre-litigation review, it is part of the proceeding and must be kept confidential," period.

Then later it goes into the issue as it relates to sanctions or the imposition of sanctions. We have one benefit here is that we don't have a jury. Sort of a unique setting as it relates to a medical malpractice case; but we don't have a jury. It's a bench trial. I've read both the statute, reference to the case law here, and let's proceed, then, as it relates to your proffer, Counsel.

MR. DRAKE: Thank you, your Honor.

THE COURT: You've provided opposing Counsel with copies of any exhibits, et cetera, that you're going to utilize?

MR. DRAKE: I have, your Honor.

THE COURT: Okay, very well. Then you may proceed, Mr. Drake.

MR. DRAKE: Thank you very much. Your Honor, may I ask at this point that we be given just permission to approach liberally in light of the fact that we're not in front of a jury?

THE COURT: Surely.

MR. DRAKE: Thank you very much. Your Honor, it would be defendant's proffer that Exhibit No. 1, which is comprised of the letter of December 31st, 2001 from Mr. Parkinson to Alexander Jacobs was in fact received by Dr. Jacobs, and the materials listed in the body of that letter include, under paragraph 1, "the copy of draft notice of intent to commence action outlines the facts and liabilities of -- liability issues of the case," quoting.

Finally at page 2 of that letter begins, "Also is enclosed is a check in the amount of $500 for an initial retainer, as well as a copy of the initial review by Dr. Greg Cane." Defendant's would offer Exhibit 1 into evidence.

THE COURT: Any objection, Counsel?

MR. PARKINSON: No.

THE COURT: You've ad -- you have in fact stipulated to or admitted as it relates to the notice of intent was received by your expert as -- in addition, the letter or the pre-litigation letter?

MR. PARKINSON: Correct.

THE COURT: Okay.

(Exhibit No. 1 received into evidence)

MR. DRAKE: Your Honor, with respect to Defendant's Exhibits 2 and 4, I would proffer that Exhibit 2 as marked is a complete copy of the letter from Dr. Greg Cane to Kenneth Parkinson of April 2nd, 2001.

I would withdraw that exhibit with the understanding, and would request that the record reflect that the entire letter was provided to Counsel, was marked as an exhibit, and it would be my intent to substitute a redacted copy of that letter as Exhibit 3. So I will withdraw Exhibit 2 and Exhibit 4 at this time.

THE COURT: Any objection, Counsel?

MR. PARKINSON: I don't believe it's necessary to withdraw it.

MR. DRAKE: Your Honor, my purpose being that any evidence of those documents in the record runs the same difficulty we're discussing; that confidential information has been disclosed. So that's my purpose in withdrawing it, having the record reflect that there was -- those documents

were in no way before the Court.

THE COURT: Okay.

MR. DRAKE: Exhibit 3 --

THE COURT: I'll grant your request or --

MR. DRAKE: Thank you.

THE COURT: -- motion.

MR. DRAKE: Exhibit 3, I would proffer, is a redacted copy of the letter from Dr. Cane to Mr. Parkinson that we've just referred to as the Exhibit 2 which has been withdrawn. I would offer Exhibit 3 into evidence.

MR. PARKINSON: No objection.

THE COURT: Okay, may be received, No. 3, the redacted copy of the Dr. Greg Cane letter.

(Exhibit No. 3 received into evidence)

MR. DRAKE: Your Honor, my further proffer with respect to Exhibit 3 is that the content of the Cane letter provides information which, if allowed and if legally permissible, I would intend to use as part of my cross examination of Dr. Alexander Jacobs.

I believe that it contains information which speaks to the bias of Dr. Jacobs and would affect the credibility of that witness. If allowed, again, I would intend to use that letter in my course of my examination.

Exhibit 5, I would proffer, is a redacted version of the notice of intent. Again, a redacted version of the

withdrawn Exhibit No. 4.

THE COURT: Okay.

MR. DRAKE: I would offer Exhibit 5 into evidence.

MR. PARKINSON: No objection.

THE COURT: Okay, the redacted version of the notice -- well, let's see -- of No. 4 is hereby received It's marked as No. 5. Okay.

(Exhibit No. 5 received into evidence)

MR. DRAKE: Your Honor, with respect to Exhibit 6, the last exhibit in my proffer, I would indicate that it is comprised of redacted documents. It is a redacted version, if you will, of the entire packet or the entire materials that Mr. Parkinson presented to the pre-litigation hearing panel in August of 2001. I'd offer Exhibit 6 into evidence.

THE COURT: Mr. Parkinson?

MR. PARKINSON: No objection.

THE COURT: Okay, may be received.

(Exhibit No. 6 received into evidence)

MR. DRAKE: Your Honor, I have bench copies of these (inaudible) evidence. That would conclude my proffer.

THE COURT: Okay, I'llake a moment, then, and review the exhibits.

(Court reviewing exhibits)

THE COURT: Okay. Counsel, let me ask a couple of questions to both sides. As I've indicated to you, I -- this

is a holding, and the materials that have been shared are clearly confidential. The language is, "Failure to keep pre-litigation proceedings confidential may in the future result in sanctions."

Now, if this were some months ago, then we could simply disqualify the good doctor. You may have had had time to secure another expert to address standards of care; but this comes on the morning of trial. So what, you know, what are my options as it relates to sanctions?

Sanctions ought to be administered. What are the only remedies here? There's a potential remedy of a mistrial; and assess costs to plaintiff and give -- and in fact disqualify Dr. Jacob, but not have it be a dispositive motion as it relates to the case, but assess costs.

Other option is simply to grant the motion to disqualify and however the plaintiff wishes to proceed at trial is how you're going to have to proceed, without your expert witness, which ultimately becomes a dispositive -- truly a dispositive motion.

A third option is because we don't have a jury, and this is a very unique setting, the Court could allow cross examination regarding these issues, to see to what degree the bias or taint may have occurred, because we're outside the presence of a jury. I could then assess that and reserve ruling on the motion until such time as cross examination

occurs. That seems to me to be an option.

Are there other options as it relates to remedies here? It's sanctionable. What are -- what are the remedies in light -- in light of the unique circumstances that this Court
is in the morning of trial?

It's your motion, Counsel. So Mr. Drake, why don't you address that as it relates to any -- or address the issue -- I respect the fact that you may not be able to go into confidential information. You may not be able to even establish issues as it relates to taint or bias, because certainly before a jury it would be inappropriate.

Because we have this unique setting, perhaps that's available to you. Maybe I order that you do that; and the confidentiality issue therefore is not an issue of waiver. It's an issue of order. I don't -- I don't know. Tell me how you've faced this in the past. I understand the case law, I think. I understand the statute. I just don't understand the potential remedies under these circumstance -- unique circumstances that we've had -- we're faced with today.

MR. DRAKE: Thank you, your Honor. I believe the Court has articulated the options; and the difficulty then is which is to be selected. I agree with your Honor that mistrial is an option. I agree with your Honor that the motion to disqualify being granted in the case, progressing if that is the choice of

plaintiff, is an option.

With respect -- and I have thought about this since a few days ago when I first discovered this. I anticipated the Court's raising the very issue of ordering -- and I know the Court would not do that, but would attempt to allow me to use this evidence in cross examining Dr. Jacobs. With respect -- with the utmost respect, I would decline, if that option were to be chosen, because it is my belief, and I think apparent from the Maret decision as well as the rules of professional conduct and the notions of confidentiality that, as I mentioned earlier, I would use that information at peril, even with the blessing of this Court. I -- again --

THE COURT: Counsel, you have to be aware that I -- if I chose that option, I would do it very, very carefully, because I would not place you in a position where I would be -- attempt to sanction or order you to violate any of -- any rules of professional conduct.

MR. DRAKE: Your Honor, and that is exactly why I phrased it the way I did. I understand, and everyone in this courtroom would expect the Court would never do that; but even to offer me the opportunity to use it, because of some notion of waiver, which I submit is not appropriate with a confidentiality issue, I will represent to the Court that I would scrupulously avoid using that information if this case is to go forward today. I would do so, again, because of my

belief that it would be error; and it would be in itself sanctionable conduct. So I would not use the information.

So in my judgment the only two viable options are the first two. I would not presume to choose one over the other for the Court, but it is not, I would submit, a notion of balancing, nor is timeliness a factor. I appreciate the difficulty. I have made a record of the timing and the manner of which this was discovered.

It is, as I have emphasized, not something that Mr. Parkinson intentionally caused, nor did I intentionally delay. It is a troubling issue. It is a grave issue. The Court has identified that. It is not a matter of balancing. It is something that has happened. The bell cannot be unrung, if you will; and I think either of those two options is appropriate, and I would leave it to the Court to decide.

THE COURT: Mr. Parkinson.

MR. PARKINSON: With respect to the timeliness issue, timeliness is an issue, your Honor. They may not have asked Dr. Jacobs extensive questions about the documents, but they have acknowledged that they received them at his deposition. That's when they received the documents. That is why they can't file a dispositive motion in this case the day before trial.

With respect to the sanctions, your Honor, what are we sanctioning for? What is the harm that's been done here?

That's the question I have. It's -- they were talking about documents that were produced and that were work product of our office, that were provided to our -- that were provided to our expert witness. They've created a strawman argument here.

THE COURT: I don't think it's a strawman argument. I think the Supreme Court has spoken; and I take exception that the issues of confidentiality is simply a strawman.

MR. PARKINSON: Well, and very respectfully, your Honor, with respect to that, I think it is a strawman argument; and the reason being is when you have a penalty -- when you have a penalty against someone, there has to be some harm; and there is no harm in this case. There's documents that we prepared for the purpose of hearing that very easily could have -- we could have sent the same information without the heading on, and said, "This is our view of the case," and provided it to them.

Then we also sent the documents of a broker that we hired to look at the case and give us an initial opinion. While the Supreme Court did say that the notice of intent is *part of this privileged confidential proceeding, and I -- and* I acknowledge that, they didn't deal with the exact same circumstances that we have here.

THE COURT: Well, I understand that.

MR. PARKINSON: And in this case there's no harm for us -- no harm to them for us providing to our witness the

documents that have been created by our office or under our direction.

THE COURT: Okay.

MR. PARKINSON: And of course with respect to my preference of a sanction is always no sanction. I don't believe it's appropriate in this case; and -- but a mistrial, my expert has probably left Colorado at this time, I think that he can go ahead and ask him questions. If he chooses not to, that's his own choice.

The Court can do that without imposing any harm on Mr. Drake; and he has no concern that he'll have sanctions by the Supreme Court for something he may do in cross examination if you give him the permission to do that. Thank you, your Honor.

THE COURT: Mr. Drake, will you respond to the sort of no harm no foul argument? I mean, that's what I -- that's about how I see his (inaudible).

MR. DRAKE: Yes, your Honor. Two comments. The notion that these documents could have been provided without their headings to Dr. Jacobs with no harm, or that that would be a permissible use of the documents, I have a difficult time agreeing with that in light of the nature of the Maret decision and the clear provisions in the statute.

The whole notion is to keep the evidence that is considered by the pre-litigation panel confidential. The

notion that one could send it without a heading and still use it in another capacity is very troubling. As to the no harm no foul, it is just that, your Honor. This is a medical malpractice case. I don't necessarily agree with the common characterization of cases being battles of experts, but the testimony of experts is critical to these cases.

The credibility of those witnesses ranges from their training, their curriculum vitae, their testimony, what materials they reviewed, how they got in the case, whether they have a practice of getting in cases like this and do a lot of this kind of work. Their credibility is touched by lots of different things.

As the Court is aware, frequently one of those things is rigorous examination of "How did you become involved in the case?" "What is your motive?" "What are you doing?" "How much of this comprises your practice?" "That is, how much medical legal work do you do?" But most importantly, "What is the fundamental information that you've reviewed?" because that's where the fertile ground for cross examination is, to demonstrate that it was either insufficient, or inaccurate, or both.

The Cane letter was the first piece of information that Dr. Jacobs got. If allowed to use that, I would be able to demonstrate that he did nothing more than literally parrot

the information in that letter, in the first of two documents that he created; his notes and his report. I would be able to point out inaccuracies. I would be able to point out mistakes. All of which were the predicate, the beginning point where Alexander Jacobs began his involvement in this case.

I can't do that. I can't use that letter. It is powerful, or would be powerful evidence in black and white to use that and contrast what Dr. Cane had to say with what Dr. Jacobs did. The no harm no foul really goes to that, your Honor. That is it. I am precluded and unable to use a very powerful piece of evidence to cross examine the critical plaintiff's witness in this case. It is prejudicial; but again, your Honor, I would go back to the point it is not a balancing that must be considered. That would be my response.

THE COURT: Okay. Anything further, Counsel?

MR. PARKINSON: Can I think just for a minute?

THE COURT: I'll take a short break, because I'm going to outline some notes here that's going to -- my decision is going to affect this entire case. So --

MR. PARKINSON: Let me say one thing with respect to this, your Honor. I think you would go the direction that you're going on this case thus far. It would be --

THE COURT: Well, but I haven't made a decision, Counsel.

MR. PARKINSON: Well, I understand that. I understand

that, and I'm not waiving our position here to any extent, but I am concerned if what is going to happen here would be -- would be just a continuance with limiting Dr. Jacobs' testimony or something along that line. It is probably better to give it some sort of ruling that the we can have the appellate Courts review, than hanging in -- kind of hanging out there waiting for something to happen and getting a new trial date. I think that would be very difficult on this case.

THE COURT: So you're either asking this Court to -- well, what are you saying?

MR. PARKINSON: Well, like I say, I'm not -- I'm not waiving our position. I'm saying as far as preferences --

THE COURT: That I grant the motion?

MR. PARKINSON: No, absolutely not. My preference is that they don't -- that you don't grant the motion. That you give no sanction; and I think I've made an argument for that with respect to that; but if the Court's decision is to mistry the case, I think the better -- the better way to deal with that would be to give us a decision, or perhaps we could look at interlocutory options that we could bring this up with the appellate Courts to have the clarify what we're doing in this situation.

THE COURT: Interrogatory options?

MR. PARKINSON: Interlocutory.

THE COURT: Oh, interlocutory.

MR. PARKINSON: Yes.

THE COURT: Well, the only way it gets before the appellate Courts, if it's a final decision.

MR. PARKINSON: That's correct.

THE COURT: I don't know that you can appeal -- appeal the mistrial. That's a matter of law, but also within the sound discretion of the Court as it relates to the unique circumstances. I'm not sure I --

MR. PARKINSON: You're asking me --

THE COURT: I'm not sure I understand what your invitation to me is.

MR. PARKINSON: Okay. My --

THE COURT: If you want a final decision that is appealable in this case, that's the granting of the motion.

MR. PARKINSON: Your question to us was?

THE COURT: What are the options?

MR. PARKINSON: What are the options? I am suggesting to you that the -- that the mistrial option is not a good option. That's what I'm saying, your Honor, for that reason.

THE COURT: So you're inviting me not to mistry the case, if that's one of the options I'm looking at?

MR. PARKINSON: That's correct. The option I am -- the option I am requesting specifically is that we allow --

THE COURT: It's either grant the motion to disqualify, or deny the motion in its entirety and say, "No harm no foul.

Let's go forward."

MR. PARKINSON: Or deny the motion and allow them to cross examine Dr. Jacobs with respect to the information he received from Greg Cane.

THE COURT: How is that a sanction? That's not a sanction.

MR. PARKINSON: Sure it is. Sure it is. They're saying they can't do it. You're giving them the allowance to do it. It is -- it is maybe playing out that they will be not harmed -- they won't be harmed.

THE COURT: But even inviting defense Counsel to cross examine as it relates to those issues, and he declined to do it for a variety of reasons, one of which addresses the confident -- the underlying, under pending issue of confidentiality and the nature of it, and the rules of professional conduct, and we still don't have an ultimate dispositive issue, because that's going to be appealed.

They may reverse. Then we come back down here and we hold this entire thing again on that very issue of whether the Court has authority in any form or fashion to invite Counsel to potentially breach rules of professional conduct. So --

MR. PARKINSON: Well, there's not -- no one cited to rules of professional conduct in this case; and the only rule that's been cited to is the one that says that this proceeding is privileged and confidential. Again, I'm asserting that a

privilege can be waived, and we are waiving it; and they can cross examine him.

THE COURT: Is the mistrial subject to appellate review?

MR. PARKINSON: What's your question again? I'm sorry.

THE COURT: Is the declaration of a mistrial based upon the unique circumstance of this case subject to appellate review?

MR. PARKINSON: If we work out the interlocutory issues it would be; but I -- under normal circumstances it's not -- I wouldn't think so.

THE COURT: I don't think so either.

MR. DRAKE: Your Honor, we should have come better prepared. I believe that it is; but it is something that as the Court has indicated, I believe would be reviewed by an abuse of discretion standard.

THE COURT: Sure.

MR. DRAKE: And so again, I believe that is subject to review.

THE COURT: Okay, I'll retire to chambers for a moment and see whether I can work through my notes, and now see what we're going to do the next three days.

(Recess taken)

THE COURT: -- Central Utah Medical Clinic, case No. 010404581. The record will reflect that I've taken a few

moments in chambers to distill my thoughts on this subject. I think that there is a fair amount of discretion that is afforded via trial Court, the trier of fact in this case as it relates to the issues presented.

I want you to know that I've carefully weighed and considered all of the options. I believe it is a grave issue. I believe it's a troubling issue. It can be at the very heart of the case. Confidentiality means something. A breach of confidentiality ought to result in sanctions.

Let me examine the options again on the record and my thinking as it relates to each. First option is simply to grant the motion to disqualify plaintiff's expert. I'm of the opinion that an expert who has access to confidential materials ought to be disqualified. I don't believe that you can un-ring the bell. I don't believe that you can ascertain the extent of the taint.

These are pre-litigation documents that are at issue. I reject the plaintiff's position of no harm no foul. They were meant to be kept confidential. The expert has had access to those documents.

Now, having stated that, I do look at the timing of this. Plaintiff is aware of it as of the date of the letter of transmittal. Defense becomes aware of it, or potentially aware of it as early as November of 2002. We are now on February the 25th of 2004.

I don't believe that the motion was brought to surprise or trap or to blind side the plaintiff at all. I believe it was brought -- appropriately brought and had to be brought before the Court. I believe that as Mr. Drake has indicated, that this really came to light during the final preparations for trial. As soon as it was, it was brought to the attention of opposing Counsel.

In light of the fact that it's brought on the morning of trial, and there is no jury, then I believe that there are some other options, at least to preserve the plaintiff's case. So while I have stated that I think that a -- that an expert ought to be disqualified, when that expert has had access to confidential materials and is aware of that, I decline to grant the motion to disqualify plaintiff's expert.

The next option is simply to allow defense Counsel to cross examine at whatever length as rigorously as to the effect of the confidential materials on the ultimate opinion of the expert. As I've indicated, I believe that an expert ought to be disqualified when he's had access to such materials. I don't know that you can un-ring the bell. I don't know that you can adequately determine the extent of the taint. I don't know that you can cure the defect. I don't know that you can rehabilitate.

Defense Counsel has indicated that they would respectfully decline to cross examine rigorously as it

relates to these issues, because they may run afoul of rules of professional conduct. These are confidential materials that they cannot simply ignore.

Credibility is absolutely critical in these cases, particularly because I'm the finder of fact, and have to assess the credibility because we don't have a jury. So I decline to order or invite defense Counsel to simply at this stage conduct a rigorous cross examination as to the involvement, the fundamental claimed inaccuracies within the confidential materials, et cetera, because I think the opinion is tainted. You can't cure the defect. You can't un-ring the bell.

So the third option is that of a mistrial. I know that that's one that the plaintiff has invited the Court not to consider. I simply exercise my discretion and declare a mistrial. I grant the motion to disqualify. It essentially becomes a dispositive motion. I've indicated I believe there's some timeliness issues as it relates to that, and grant a mistrial. It preserves the claim and all causes of action. Allows the plaintiff her day in Court, albeit in the future; and the claims -- the potential for the claims to be heard on the merits.

So I have faced what I consider to be the grave issue, the troubling issue. I've looked at the timeliness involved. I've looked at the various options. I've weighed it carefully. I've considered all of the options. I have identified what I

believe are the strengths or the downside of each of those options, and grant a mistrial in this case.

I assess the costs associated with that as may be determined by affidavit, and strike the trial for the next two days. I believe that that result preserves this Court's attention to confidential matters. It is a sanction that addresses the breach in a way that is not dispositive. Then Counsel can reassess the direction in the case.

Mr. Drake, I'm going to invite you to prepare, then, an order of mistrial based upon this, this decision. I do rely upon the Supreme Court case as provided, the Maret case, indicating that that is in fact a holding. It's not a collateral issue where it's simple dicta, and that they will address it in the future.

The Supreme Court is clear when it says, "Today we hold," and inviting any trial Court Judge where there is a breach as it relates to issues of confidentiality then to address sanctions, and the appropriate sanctions under the circumstances.

I think they are unique circumstances in this case. I've weighed them carefully. I've considered all of the options. I've considered the gravity of the breach. I've considered the exhibits that have been submitted, it's the very heart of the case; and that's the decision of this case -- this Court.

Any questions or -- as it relates to clarification, then?

MR. DRAKE: No, your Honor. I will prepare the order.

THE COURT: Mr. Parkinson?

MR. PARKINSON: No.

THE COURT: Let me visit with both sides just briefly in chambers; and then you can have discussions with your clients after that.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 26th day of June 2006.

My commission expires:
February 24, 2008

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

BEVERLY LOWE
Notary Public
State of Utah
My Commission Expires Feb 24, 2008
1909 S Washington Ave Provo UT 84606

D

E

Attachment C

Order prepared and submitted by:
Curtis J. Drake [A0910]
Tawni J. Sherman [A8133]
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Defendants
Bruce H. Chamberlain, M.D. and
Central Utah Medical Clinic

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

REBEKAH MUNSON, Plaintiff, vs. BRUCE H. CHAMBERLAIN, M.D. and CENTRAL UTAH MEDICAL CLINIC, Defendant.	**ORDER OF MISTRIAL** Case No. 010404581 Honorable Lynn W. Davis Division #8

The parties appeared for trial before the Honorable Lynn W. Davis on February 25, 2004, at 9:00 a.m. Curtis J. Drake and Tawni J. Sherman of Snell & Wilmer appeared for Defendants Bruce H. Chamberlain, M.D. and Central Utah Medical Clinic ("**Defendants**"). Kenneth Parkinson of Howard Lewis & Peterson appeared for plaintiff Rebekah Munson ("**Plaintiff**"). Defendants moved to disqualify Plaintiff's expert, Dr. Alexander Jacobs, on the ground that Plaintiff had provided to Dr. Jacobs certain written materials that are confidential and protected from disclosure, pursuant to the provisions of the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq., and the case of Doe v. Maret, 984 P.2d 980 (Utah 1999). Based upon the arguments of counsel, evidence proffered at trial, the record herein, and for other good cause shown, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. On the afternoon of February 24, 2004, Curtis J. Drake notified Kenneth Parkinson, via facsimile, that he intended to make a motion to disqualify Plaintiff's expert witness, Dr. Alexander Jacobs, on the ground that Plaintiff had provided to Dr. Jacobs certain materials that had also been submitted to the prelitigation panel that initially heard this matter.

2. Trial was regularly set for February 25-27, 2004. On February 25, 2004, at 9:00 a.m., the parties appeared and were ready to proceed with trial. Plaintiff brought to the Court's attention Defendants' statement that they would be moving to disqualify Dr. Jacobs, and the Court heard oral argument on the matter.

3. Plaintiff admitted during oral argument that she had provided Dr. Jacobs with two documents that had previously been submitted to the prelitigation panel: (a) a copy of the Notice of Intent to Commence Action ("**Notice of Intent**"); and (b) a copy of an initial review of the medical records, performed by Dr. Greg Kane ("**Dr. Kane**"). These two documents are referred to collectively as the "**prelitigation materials**."

4. That Plaintiff submitted the prelitigation materials to the prelitigation panel is memorialized in a pleading submitted to the Division of Occupational and Professional Licensing entitled *Documents Submitted to Prelitigation Panel*, dated August 28, 2001. A redacted copy of this pleading was offered into evidence and admitted without objection as Defendants' Exhibit 6.

5. That Plaintiff submitted the prelitigation materials to Dr. Jacobs is also memorialized in a December 31, 2001 transmittal letter from Mr. Parkinson to Dr. Jacobs, specifying the documents Mr. Parkinson was sending to Dr. Jacobs for his review. A copy of the December 31, 2001 letter was proffered and admitted into evidence without objection, and was marked Defendants' Exhibit 1.

6. A complete copy of the Notice of Intent was marked as Defendants' Exhibit 4, and a redacted copy of the Notice of Intent was marked as Defendants' Exhibit 5. Exhibit 4 was

withdrawn and not entered into evidence. Exhibit 5 was admitted into evidence without objection.

7. A complete copy of Dr. Kane's initial review of the medical records, dated April 2, 2001 (the "**Kane Letter**") was marked as Defendants' Exhibit 2, and a redacted copy of the Kane letter was marked as Defendants' Exhibit 3. Exhibit 2 was withdrawn and not entered into evidence. Exhibit 3 was admitted into evidence without objection.

8. Defendants had constructive notice that the prelitigation materials had been given to Dr. Jacobs on November 18, 2002, when Dr. Jacobs' deposition was taken. Defendants did not have actual knowledge that the prelitigation materials had been given to Dr. Jacobs until shortly before trial, when Defendants were engaged in their final preparation for trial.

9. The Court finds that Defendants' motion to disqualify Dr. Jacobs was brought timely and in good faith, and with no intent to surprise Plaintiff.

10. The Court also finds that Plaintiff's submission of the prelitigation materials to Dr. Jacobs was done intentionally but without knowledge of the prelitigation materials' confidential status.

CONCLUSIONS OF LAW

1. Under section 78-14-15 of the Utah Code, "[e]vidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction." Utah Code Ann. § 78-14-15(1).

2. Under section 78-14-12(1)(d) of the Utah Code, "[p]roceedings conducted under the authority of this section are confidential, privileged, and immune from civil process." Utah Code Ann. § 78-14-12(1)(d).

3. In Doe v. Maret, 984 P.2d 980 (Utah 1999), the Utah Supreme Court noted that it had never determined whether a notice of intent was "part of the prelitigation 'proceeding'"

under section 78-14-12(1)(d). The Court then held that "because the notice of intent serves as the basis for the prelitigation panel review, and because it is often utilized as part of the prelitigation review, it is part of the proceeding and must be kept confidential." Id. at ¶21. Although it declined to issue sanctions to the party that had disclosed confidential prelitigation material "in view of the heretofore unsettled status of the notice," the Supreme Court cautioned that "failure to keep prelitigation proceedings confidential may in the future result in sanctions." Id.

4. The Supreme Court's statements in Maret regarding the confidentiality of prelitigation materials constituted a holding of that court, and the statements were not dicta, as argued by Plaintiff.

5. This Court concludes that an expert witness who has been given access to confidential prelitigation materials should be disqualified. The Court feels that the matter is grave and serious, and warrants sanctions.

6. The Court carefully considered three possible options or sanctions for Plaintiff's failure to preserve the confidentiality of the Prelitigation Materials: the court could grant Defendants' motion to disqualify Dr. Jacobs; the court could allow Defendants to cross examine Dr. Jacobs as to the effect of the confidential prelitigation materials on Dr. Jacobs' ultimate opinion; or the Court could grant a mistrial.

7. The court declines to grant Defendants' motion to disqualify Dr. Jacobs. The Court concludes that sanctions are warranted, and rejects Plaintiff's contention that Defendants were not harmed by Plaintiff's disclosure of confidential prelitigation materials to Dr. Jacobs. However, because Defendants' motion was brought at the beginning of trial and because there is no jury, the Court would like to impose a sanction that would preserve Plaintiff's case.

8. The Court also declines to invite or order Defendants to cross examine Dr. Jacobs regarding the confidential prelitigation materials. Mr. Drake has indicated that even if allowed by the Court to do so, he would not use the confidential prelitigation materials in his cross

examination, so as to avoid violating any ethical obligation to preserve the confidentiality of the prelitigation materials. The Court recognizes that Defendants should be able to vigorously cross-examine Dr. Jacobs, as his credibility is crucial to Plaintiff's case, but that Defendants cannot now do so because the prelitigation materials are confidential.

9. The most equitable sanction in this case is for the Court to grant a mistrial. Doing so would sanction Plaintiff for her disclosure of confidential prelitigation materials, but would also preserve Plaintiff's cause of action.

Based upon the foregoing findings of fact and conclusions of law, the Court hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. Defendants' motion to disqualify Dr. Jacobs is denied.

2. The Court declines Plaintiff's invitation to allow Defendants to cross examine Dr. Jacobs regarding the substance of the confidential prelitigation materials.

3. The Court exercises its discretion to grant a mistrial.

4. Defendants are hereby awarded their costs of court incurred in connection with Plaintiff's expert, Dr. Alexander Jacobs.

DATED this 26 day of March, 2004.

BY THE COURT:

Honorable Lynn W. Davis
Fourth District Court Judge

0259

APPROVED AS TO FORM:

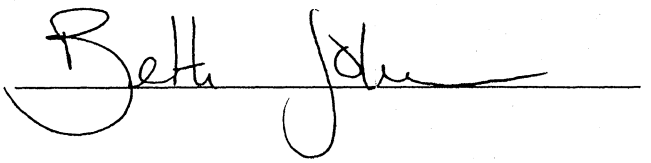
_____

Kenneth Parkinson
Attorney for Plaintiff Rebekah Munson

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing ORDER OF MISTRIAL was mailed the 15th day of March, 2004, to the following:

Kenneth Parkinson
Howard, Lewis & Petersen
120 East 300 North
P.O. Box 1248
Provo, Utah 84603



SHERMAT\SLC\287566

0257